Supreme Court, U.S.
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No. 88-1737

In the Supreme Court of the United States

OCTOBER TERM, 1989

ELMER R. BARBEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the United States Claims Court does not have jurisdiction over petitioner's claim that he was improperly discharged from his job with the North Carolina Army National Guard.

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OPINIONS BELOW

The opinion of the United States Claims Court (Pet. App. A1-A10) is reported at 14 Cl. Ct. 387. The opinion of the court of appeals (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989. The petition for a writ of certiorari was filed on April 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 709 (32 U.S.C.) provides:

§ 709. Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army * * * persons may be employed as technicians in—

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

* * * * *

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned,

* * * * *

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

* * * * *

(5) a right of appeal which may exist with respect to clause * * * (3) * * * shall not extend beyond the adjutant general of the jurisdiction concerned;

* * * * *

(f) Sections 2108, 3502, 7511, and 7512 of title 5 do not apply to any person employed under this section.

STATEMENT

1. Petitioner filed this action against the United States in the Claims Court in 1986. Petitioner alleged in his complaint that he was a pilot with the North Carolina Army National Guard from 1973 to 1980 (Pet. App. A2). He alleged that, in 1979, his supervisors refused to give him clearance to fly. Petitioner complained to National Guard officials about his supervisors' decision, as well as other

aspects of their performance (*ibid.*; Compl. paras. 7-11). Petitioner then asked the Adjutant General of the North Carolina Army National Guard to review the matter. The Adjutant General "determined that although [petitioner's] general allegations had some merit, they were insufficient to overturn his supervisors' decision" (Pet. App. A2-A3). Later, on February 22, 1980, petitioner's immediate supervisor proposed to dismiss petitioner from the National Guard. The Adjutant General sustained that proposal, and petitioner was discharged on April 11, 1980 (*id.* at A3).

Petitioner alleged in his complaint in the Claims Court that the Adjutant General was biased against him, and that petitioner was denied procedures guaranteed by internal rules of the National Guard (Pet. App. A3-A4). Petitioner asked for damages in the amount of $1.5 million (*id.* at A4).

2. The Claims Court granted the government's motion to dismiss the complaint. The Claims Court first ruled that it had no jurisdiction over petitioner's claims sounding in tort and alleging violations of civil rights statutes (Pet. App. A5-A8).[1] The court then addressed petitioner's "main claim" for back pay (*id.* at A8). Relying on *United States* v. *Fausto,* 108 S. Ct. 668 (1988), the court held that it lacked jurisdiction over that claim as well. It ruled that the Civil Service Reform Act of 1978 did not provide for judicial review of the Adjutant General's decision to discharge petitioner. The Claims Court stated that "the sole remedy to [petitioner] from the alleged administrative violations by his * * * supervisors, was his appeal to the Adjutant general" (Pet. App. A9-A10).

3. The court of appeals affirmed. The court noted that petitioner was an "excepted service employee" under the

[1] Petitioner did not challenge that aspect of the Claims Court decision on appeal.

Civil Service Reform Act (Pet. App. B2). The court then observed that *Fausto* held that such employees may not bring an action for back pay in the Claims Court if that action challenges the validity of an employment decision (*ibid.*). The court of appeals concluded, therefore, that "the Claims Court properly dismissed [petitioner's] complaint" (*ibid.*).

The court of appeals also rejected (Pet. App. B2-B3) petitioner's contention that he was entitled to review under the Civil Service Reform Act because he was a so-called "preference eligible veteran" under 5 U.S.C. 2108. The court relied on 32 U.S.C. 709(f), which states that Section 2108 of Title 5 does not apply to persons employed by the National Guard.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. Thus no further review is warranted.

1. Petitioner renews his claim (Pet. 12-23) that he is entitled in the Claims Court to review of the Adjutant General's decision to discharge him. That contention is foreclosed by *United States* v. *Fausto, supra.*

In *Fausto,* this Court examined the interplay between the Back Pay Act (5 U.S.C. 5596(b)(1)) and the Civil Service Reform Act and held that members of the excepted service are not entitled to judicial review of adverse personnel actions. 108 S. Ct. at 677. The Court noted, however, that "if an employee is found by an 'appropriate authority' to have undergone an unwarranted personnel action a suit for backpay will lie" under the Back Pay Act.

[2] Section 709 of Title 32 covers the employment of "technicians" by the National Guard. It is undisputed that petitioner was such a technician. See Pet. 6.

Ibid. In this case, the "appropriate authority" is defined by 32 U.S.C. 709(e)(3) as the Adjutant General. And 32 U.S.C. 709(e)(5) states that a "right of appeal * * * shall not extend beyond the adjutant general." Accordingly, because the Adjutant General determined that petitioner's discharge was proper, the lower courts correctly dismissed petitioner's claim for back pay.[3]

Petitioner nevertheless contends (Pet. 16-20) that he is entitled to judicial review because he is a "preference eligible" veteran under the Civil Service Reform Act. As the Court noted in *Fausto* (108 S. Ct. at 672-673), the Civil Service Reform Act includes such veterans in the class of employees who are entitled to review of adverse employment decisions. See 5 U.S.C. 2108, 7511, 7512. But 32 U.S.C. 709(f) expressly excludes employees of the National Guard from those provisions of the Civil Service Reform Act. Thus the court of appeals correctly held that, because petitioner was employed as a technician by the National Guard, he was not entitled to review " 'beyond the adjutant general' " (Pet. App. B3) (quoting 5 U.S.C. 709(e)(5)).

Moreover, preference eligible veterans are entitled under the Civil Service Reform Act to administrative review before the Merit Systems Protection Board, followed by judicial review in the Federal Circuit. See *Fausto,* 108 U.S. at 672-673. Here, petitioner filed his action for back pay in the Claims Court. Thus, even if petitioner were a preference eligible veteran entitled to further review under the Civil Service Reform Act, the Claims Court properly dismissed the complaint.

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[3] Petitioner insists (Pet. 12-14) that the Claims Court had jurisdiction over his allegations of wrongful discharge because he claims that the Adjutant General violated internal regulations of the Army. The point of *Fausto,* however, is that such claims are not reviewable in the Claims Court under the Tucker Act.

2. Petitioner next argues (Pet. 15-16) that, under *Fausto,* he was entitled to bring his action for back pay because an "appropriate authority" has determined that he was improperly discharged. He cites a letter dated March 7, 1989, that he received from Colonel Rinkel in the Army's Office of the Inspector General in which Colonel Rinkel states that the Adjutant General acted improperly in 1980. That letter, which petitioner received after the Federal Circuit issued its opinion, does not cast any doubt on that court's judgment. If petitioner believes that new evidence supports his claim under the Back Pay Act, he should bring the matter to the Claims Court in the first instance.

In any event, the March 7, 1989, letter does not appear to be the decision of an "appropriate authority" as that phrase is used in the Back Pay Act. Under 32 U.S.C. 709, the Adjutant General is given the final word on whether to discharge an employee in petitioner's position. And the Inspector General of the Army has no authority to correct a personnel action taken by the Adjutant General against a technician. See Army Reg. 20-1, paras. 1-25c, 5-1, 5-2a (Sept. 16, 1986). Accordingly, the letter from Colonel Rinkel in the Inspector General's Office merely expressed an opinion of the writer;[4] it was not a finding by an "appropriate authority" that petitioner's discharge was illegal.[5]

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[4] We are informed by the Army that the Office of the Inspector General has determined that Colonel Rinkel's letter of March 7, 1989, was incorrect. By letter dated May 30, 1989, Colonel Rinkel informed petitioner that she believed the Adjutant General did not violate internal Army regulations. See App., *infra,* 1a-2a.

[5] Petitioner's final contention (Pet. 20) that his claim arises under Article I, Section 8, of the Constitution is frivolous. The constitutional provision that petitioner cites gives the Congress the power to raise and organize a militia. That provision is plainly not implicated by a

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1989

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claim that an adjutant general of the National Guard improperly discharged an employee.

APPENDIX

[SEAL]

DEPARTMENT OF THE ARMY
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C. 20310-1700

May 30, 1989

Assistance Division

Lieutenant Colonel Elmer R. Barbee
Post Office Box 130
Manchester, Kentucky 40962

Dear Colonel Barbee:

On March 7, 1989, I sent you a final reply to your February 1, 1989, Army Inspector General Action Request (IGAR). Your IGAR focused on allegations of retribution which you felt violated the June 15, 1978, version of Army Regulation (AR) 20-1, Inspector General Activities and Procedures. My reply contained several findings about AR 20-1 and the removal action taken against you.

Upon further legal review of this matter, it is clear that the provisions of AR 20-1 cited in my March 7, 1989, letter did not apply to your case.

The June 15, 1978, version of AR 20-1 had a provision in paragraph 5-1b which said, "Army regulations do not apply to the ARNG except where specifically made applicable or where made applicable in whole or in part by National Guard regulations or other National Guard Bureau publications." Paragraph 1-2, Applicability, which said, "This regulation applies to the Active Army, the U.S. Army Reserve and the Army National Guard", did not be-

come effective until February 15, 1980, when Change No. 1 to that version of AR 20-1 was implemented. No National Guard regulations or other National Guard Bureau (NGB) publications existed between June 15, 1978, and February 15, 1980, which made AR 20-1 applicable in whole or in part to members of the ARNG while not in the active Federal service of the United States.

Since the provisions of AR 20-1 cited in my March 7, 1989, letter did not apply to your October 24, 1979, IGAR and the State Inspector General's November 12, 1979, report of investigation concerning your allegations, my final reply to your IGAR was incorrect. I offer no opinion on the applicability of North Carolina laws or state regulations to your case.

Additionally, I have reviewed your May 5, 1989, letter concerning your disagreement with the North Carolina Adjutant General's April 25, 1989, letter to you. Unfortunately, for the above mentioned reasons, I am unable to pursue this matter further. I regret any inconvenience this may have caused you.

Sincerely,

Marcia Rinkel
Colonel, Inspector General
Chief, Assistance Division

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